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Decision 03-10-023 October 2, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Authority to Institute a Rate Stabilization Plan with a Rate Increase and End of Rate Freeze Tariffs.	Application 00-11-038
Emergency Application of Pacific Gas and Electric Company (U 39 E) to Adopt a Rate Stabilization Plan.	Application 00-11-056
Petition of The Utility Reform Network for Modification of Resolution E-3527.	Application 00-10-028

ORDER DENYING REHEARING OF DECISION 03-09-017

I. SUMMARY

This decision denies Pacific Gas & Electric Company's application for rehearing of Decision (D.) 03-09-017 (Decision). The Decision directed PG&E to remit a true-up to the Department of Water Resources (DWR) for all of the energy that DWR supplied to PG&E's service territory which was purportedly used to meet PG&E's Western Area Power Administration (WAPA) load obligations during the period from January 17, 2001 to the present. The Decision also provided that PG&E's shareholders shall pay interest on the true-up amount. On September 15, 2003, PG&E filed a timely application for rehearing of D.03-09-017. The application only challenges the requirement that PG&E's shareholders bear the interest on the WAPA true-up amount. We have reviewed

PG&E's allegations of legal error and find that they do not demonstrate legal error in the Decision. Accordingly, PG&E's application for rehearing is denied.

II. BACKGROUND

On March 6, 2003, DWR transmitted a Memorandum to Commissioners Brown and Lynch requesting that the Commission take necessary steps to ensure that DWR received appropriate remittances from all energy delivered to retail customers in PG&E's territory. DWR's Memorandum was treated as a request to modify the servicing orders that were approved in D.02-05-048 and D.02-12-072. Due to the use of certain language in the servicing order and Operating Order governing PG&E, PG&E had interpreted the servicing orders in a manner that allowed it to treat DWR-supplied energy as if it were delivered for PG&E to meet its load obligation with WAPA, while withholding from DWR the power charge payments associated with this energy.

In D.02-05-048, the Commission approved a servicing order for PG&E and DWR, and ordered PG&E to comply with all of the terms and conditions of the servicing order. In Section 3 of Attachment B of the servicing order, the Commission used the term "total demand," instead of "total retail demand." PG&E had expressed concern that the use of "total retail demand" would increase the remittances to DWR, and would exclude the WAPA load. The difference between the two terms was discussed in D.02-05-048 at pages 11 and 12 of the decision, wherein the Commission stated:

> "Although the wording is different, the concept of 'total retail demand' is identical to 'total bundled service energy provided to Customers.' That said, we observe that as a policy matter, we have consistently articulated at the Federal Energy Regulatory Commission (FERC) and elsewhere that retained generation is to serve PG&E's native load customers, i.e., customers that are not served by the WAPA. As far as we are concerned, and to avoid any uncertainty, we state that WAPA customers are being served with DWR power, and should be included in the denominator used to establish the DWR Percentage.

> WAPA load should also be reflected in the numerator used to establish the amount of DWR power. Those changes have been made to section 3 of Attachment B."

As a result of the use of "total demand" in the servicing order, load associated with PG&E's WAPA contract obligations was included in the forecast of PG&E's retail end-use customer usage. PG&E claims to have used DWR energy to serve its wholesale obligations. (D.03-09-017 at 8.) However, due to the conflict between the remittance formulas in the servicing order and the operating order,[1] PG&E interpreted the clause at page C-7 of the Settlement Principles in the operating order to mean that the remittance formula in the servicing order should govern. Under the remittance formula of the servicing order, the WAPA load is not included because PG&E views it as a non-retail load. As a result of this interpretation, PG&E has withheld from DWR the remittances attributable to the energy used to meet PG&E's WAPA load obligations. So while PG&E's interpretation allowed for the allocation of DWR power based on "total demand," which includes WAPA load obligations, it only remitted payments to DWR for the portion of DWR power deemed by PG&E to have served retail load, which does not include WAPA load.

In D.03-09-017, the Commission clarified its intent in D.02-05-048 and D.02-12-072 that PG&E should have paid DWR, using the Commission-approved DWR power charge, for all of the energy that DWR supplied to PG&E's service territory and was purportedly used to serve WAPA load obligations. It

[1] The various Commission decisions which led PG&E to withhold remittances to DWR for energy used to fulfill PG&E's WAPA load obligation are discussed in more detail in D.03-09-017 at pages 18-22.

modified those two decisions accordingly, and ordered PG&E to pay the under-remittance amounts that PG&E withheld from DWR. It also clarified D.02-05-048 to state that WAPA customers are not being served with DWR energy. The Decision also held that PG&E's shareholders shall pay interest on the above amount as determined in a future Commission decision.

III. DISCUSSION

PG&E requests that the Commission modify the decision so that any interest associated with the WAPA true-up is treated as are all other remittances to DWR, and so is borne by PG&E's ratepayers, not PG&E's shareholders. According to PG&E, requiring the shareholders to pay this interest constitutes a "civil penalty" for the delay in payment. PG&E claims there is no justification for imposing such a penalty, since it was at all times operating in compliance with Commission decisions.

According to PG&E, prior to the issuance of D.03-09-017, PG&E would have been acting in violation of Commission decisions if it had remitted the WAPA true-up to DWR. Therefore, according to PG&E, one could not reasonably conclude that PG&E should have remitted the WAPA true-up to DWR sooner, and therefore require shareholders to bear the costs of interest as some sort of disallowance or "penalty" for delay.

In support of this argument, PG&E states that prior to the modifications to the servicing order adopted in D.03-09-017, the funds PG&E held in trust for DWR were equal to the ratio of DWR power to *total demand* (as opposed to total *retail* demand), multiplied by the amount billed to PG&E's retail customers, with that result multiplied by the currently adopted remittance rate. PG&E states that this is exactly the formula for the amounts that PG&E did remit to DWR. Once the Commission adopted D.03-09-017, PG&E argues, then *at that point in time* the definitions in the servicing order changed. PG&E argues that only when the Commission adopted D.03-09-017 did the WAPA true-up become an amount held in trust for DWR. PG&E claims that if it had remitted the

additional amounts DWR demanded, PG&E would not have been in compliance with the servicing order. PG&E also points out that in the proceeding leading up to the adoption of the revised servicing order in D.02-12-072, the Commission rejected DWR's request to modify the remittance calculation to use "total retail demand" rather than "total demand."

PG&E fails to specify legal error in the Decision. First, PG&E mischaracterizes the interest payment as a "civil penalty." Asking PG&E to bear the interest payment associated with the WAPA true-up is not the same as imposing a civil penalty for violating Commission decisions. Since the money that PG&E withheld from DWR belonged to DWR regardless of any perceived ambiguities in Commission decisions, the interest associated with this amount also belongs to DWR. In addition, PG&E acknowledged that it had been accruing the monies in the event the Commission determined that PG&E owes DWR for energy used to serve wholesale obligations and there is no reason why PG&E shareholders should benefit by retaining any interest accrued on this amount. Requiring PG&E to give back DWR its rightful monies does not constitute a civil penalty.

Second, although the Commission did not find that PG&E had willfully violated any Commission decisions, it was PG&E's interpretation of various decisions that allowed these circumstances to happen. Regardless of any perceived ambiguities in various Commission decisions, the bottom line is that PG&E interpreted these decisions in a manner that allowed it to use DWR energy to serve its WAPA obligations without paying for this energy. Although the Commission intended to use total demand, including WAPA obligations in order to determine PG&E's forecast of retail end-use customer usage and allocation of DWR power, it did not intend that PG&E could actually use this power to serve its WAPA obligations without paying for it. PG&E's interpretation to the contrary is not harmonious with various provisions of AB1X, which provides that title to the energy belongs to DWR (Water Code § 80110), and that DWR's energy is to be

provided to retail end use customers (Water Code §§ 80104, 80110, 80116). In addition, the Commission has determined that when the utilities' retail end-use customers take delivery of the energy supplied by DWR, those customers are deemed to have purchased the energy from DWR. (See D.01-03-081.)

PG&E's argument also wrongly presumes that this money only belonged to DWR, and thus PG&E only held it "in trust" for DWR, once the Commission issued D.03-09-017. Such an argument overlooks the fact that the energy was supplied to serve retail customers, that title to this energy belonged at all times to DWR, that PG&E withheld the monies associated with this energy, and that these monies properly belonged to DWR even prior to any modifications made by the Commission. Although the Commission modified Decisions 02-05-048 and 02-12-072 to clarify its intent with regard to the remittance formula and use of DWR energy for WAPA obligations, this does not change the fact that the energy used by PG&E to serve its WAPA obligations belonged to DWR, and the monies associated with this energy properly belonged to DWR regardless of the Commission's modifications.

It was PG&E's interpretation of various Commission decisions that led to its untimely remittances associated with the WAPA load. In interpreting the decisions as it did, PG&E assumed the risk that it would be ordered to make this true-up payment and that this payment may be considered a default or delinquent payment for which interest would be due under the servicing agreement. As explained above, PG&E's interpretation is in conflict with various provisions of AB1X and other Commission decisions which recognize that title to this energy rightfully belongs to DWR and any monies received by PG&E during collection for actual DWR power supplied are to be segregated and held in trust for the benefit of DWR pending their transfer to DWR. As such, PG&E has offered no reason why its ratepayers should be held responsible for the payment of interest, and fails to demonstrate legal error with respect to the Commission's decision to hold PG&E's shareholders responsible for this interest payment.

Therefore, **IT IS ORDERED**, that:

1. PG&E's Application for Rehearing of Decision 03-09-017 is denied.

This order is effective today.

Dated October 2, 2003 at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners